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Communications and Energy Dispute Resolution Associates (January 6, 1997)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)
Telecommunications Act)
of 1996)

CC Docket No. 96-238

Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)

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To: The Commission

**COMMENTS OF COMMUNICATIONS AND ENERGY DISPUTE
RESOLUTION ASSOCIATES**

Communications and Energy Dispute Resolution Associates (CEDRA), a firm providing Alternate Dispute Resolution (ADR) services to the telecommunications, energy and public utility industries, submits its Comments with respect to the above-referenced proceeding. By this rulemaking proceeding the Commission seeks to adopt rules to implement the new time lines for dispute resolution contained in the Telecommunications Act of 1996.

SUMMARY

Congress recognized that increased competition in the telecommunications industry will invariably bring with it an increase in disputes between companies who compete with each other

at the same time as they do business with each other. The new time lines for resolving complaints against common carriers contained in the Telecommunications Act of 1996 (the Act) demonstrates that Congress expects competition to occur without extended delays caused by litigation. Accordingly, the Commission has proposed rules designed to accelerate the formal complaint process. The Commission is also encouraging disputants to resolve their disputes without Commission intervention. Cedra's comments principally address those proposals designed to encourage settlement of disputes by the parties.

The deadlines established by the Act require the Commission to rule on disputes in relatively short time frames which begin with the filing of a formal complaint. These time frames do not provide the Commission with the luxury of devoting any significant amount of time to settlement procedures. Accordingly, the proposed rules seek to encourage parties to resolve disputes before a formal complaint is filed. The proposed rules require the complainant to state in its complaint that settlement discussions have taken place. Although this requirement is well intentioned, CEDRA believes that more detailed dispute resolution requirements are necessary if a significant number of disputes are to be resolved before the formal complaint is filed. CEDRA suggests the following procedures be adopted:

- * A formal complaint must be served on defendant(s) at least 14 days prior to the filing of the complaint at the Commission.
- * Within three days of service of the complaint, the plaintiff must contact the defendant(s) for the purpose of the possibility of settlement..
- * In a transmittal letter that accompanies the filing of the complaint, plaintiff must

state the date that the formal complaint was served on each defendant and that the possibility of settlement has been discussed with the defendant(s).

COMMENTS

1. There is a tension between the Commission's desire to encourage settlement of disputes that result in formal complaints and the deadlines imposed by the Act for Commission resolution of those complaints. Once a complaint is filed, there just is not much time for the Commission to devote to dispute resolution procedures outside the adjudication of the complaint itself. The Commission's proposed rules require the parties to at least consider settlement prior to the filing of the formal complaint. Cedra believes that more can be done to structure a procedure that will enhance the possibility of settlement.

2. Sometimes one or more of the parties to a formal complaint requires a Commission ruling to establish precedent defining the rights and obligations of the parties and settlement of the dispute is not appropriate. Most of the time, however, settlement is to be preferred. It saves the parties time and money, imposes less of a burden on the agency, and can result in a more customized resolution designed by the parties to meet their present and future needs (a Commission decision only addresses a particular formal complaint whereas a settlement can look forward and provide a road map for future dealings between the parties). The procedure suggested by Cedra are designed to allow for effective settlement procedures without subtracting from the time allowed by the Act for Commission resolution of formal complaints.

3. The proposed rules requiring settlement discussions before the filing of a formal complaint are vague and not apt to result in significant settlement discussions. It is likely that the

parties have been in adversarial positions for some time and have made their positions clear. Probably several attempts to resolve the dispute have already occurred. It is the formal complaint itself that brings the parties to the point where productive settlement discussions are possible even if prior attempts have failed. The formal complaint requires the plaintiff to support its claims and places the defendant in the position of having to refute those claims. It takes the dispute to a higher level and requires both sides to seriously consider the legitimacy of their positions.

5. Cedra suggests that the Commission adopt rules which require plaintiffs to serve copies of their complaints on defendants prior to the filing of the complaint with the Commission. The plaintiff would be required to contact defendant within three days of service of the complaint to discuss the possibility of settlement of the dispute. The plaintiff would be permitted to file its complaint with the Commission 14 days (or some other period established by Commission rule) after service on the defendants. (The rule regarding the Formal Complaint Intake Form can be amended to include information regarding compliance with these requirements). However, the plaintiff could delay the filing of the complaint if it was satisfied with the way settlement procedures were progressing. Of course, if settlement is reached, the complaint need never be filed.

6. Cedra believes that a significant number of disputes would be settled if these procedures are adopted. The parties would realize that once the complaint is filed the Commission would have to devote its energies to adjudicating the formal complaint and would not be in a position to put the litigation on hold to allow for settlement procedures. Although the parties would be free to settle their dispute anytime prior to an agency determination, once the

formal complaint is filed they would also have to devote energy to the litigation. The parties would be highly motivated to settle their dispute after service of the complaint on the defendant and before the filing of the complaint at the Commission.

7. Certainly, the procedure we have recommended carries with it the potential that parties will engage in settlement procedures over a period of time without success and that filing of the formal complaint and the Commission decision will be delayed. However, the plaintiff can be relied upon to avoid undue delay because it can file the complaint anytime after 14 days following service of the complaint if it is not satisfied with the pace of the settlement procedures or the good faith participation of the defendant. The risk of abusive delays is small when weighed against the potential for settlement. Moreover, parties to formal complaints are often engaged in a continuing business relationship and a Commission decision in one complaint proceeding does not guarantee that there will not be future disputes and additional formal complaints. Negotiated settlements, particularly those reached through mediation, can look forward and provide methods for avoiding future disputes and resolving those that do arise. Because competition and its public interest benefits are enhanced by these settlements, the possibility that unsuccessful settlement attempts will sometimes delay resolution of a dispute is not a reason to make settlement procedures more difficult to utilize.

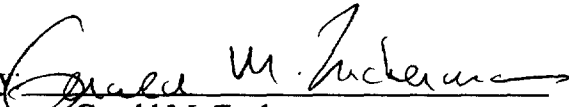
8. At paragraph 29 of the NPRM the Commission invites comments on whether outside experts are needed to address technical issues raised by formal complaints and whether the use of experts would expedite resolution of complaints. The Commission should encourage parties to take whatever steps they deem necessary to resolve disputes without government intervention. If

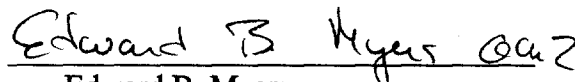
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the dispute raises extremely technical issues the parties are always free to utilized experts as arbitrators or mediators to assist in the resolution of the controversy. The procedures recommended by Cedra would provide the parties with the opportunity to utilize neutrals to assist in dispute resolution. The Commission need not adopt any specific rules regarding the use of private committees of experts.

Respectfully submitted,

**COMMUNICATIONS AND ENERGY
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